THE MERC MESSENGER

DEPARTMENT OF CONSUMER & INDUSTRY SERVICES
EMPLOYMENT RELATIONS COMMISSION
BUREAU OF EMPLOYMENT RELATIONS

Vol. 1 No. 4 November 1996

COMMENTS FROM THE CHAIR

by Maris Stella Swift, MERC, Chair

Fall, like the other seasons at MERC, finds all of us quite busy. There are four matters, however, which stand out in my mind as well worth noting. The first involves our survey on mediation services. Rick Posthuma, a doctoral candidate at Purdue University, will soon be sending a questionnaire to many of you regarding your satisfaction with our mediation services. While the Commission and staff have had input into these questions, Mr. Posthuma and Purdue University as part of their research on dispute resolution processes will complete the final set of questions, send out all of the mailings and tabulate the results. Our hope is that with Purdue's involvement, all of you will understand that the survey will be truly anonymous and that those of you who use our mediation services will feel free to be candid when answering the questions. Your cooperation in this effort will be greatly appreciated and will help us in our mission.

The second matter of note is that Oakland University Professor Michael Long has offered to put all current Act 312 and Fact Finding reports on an Oakland University Web site. Copies of the discs that we receive from fact finders and Act 312 arbitrators will be sent to Professor Long and he will have his students put the decisions on the computer.

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BUREAU DIRECTOR'S COLUMN

by Shlomo Sperka, Director, BER

Training and education for the labor-management community are important functions of the MERC/BER. Many of you know of our programs for arbitrators and fact finders. Now we are ready to reach out further.

On May 16, 1997, at the Eberhard Center of Grand Valley State College in Grand Rapids, MERC/BER will hold what we hope will be the first MERC Public Sector Labor Law Conference. This one day conference will present a program on all aspects of labor law administered by MERC.

continued on page 2

HOLD THE DATE!!

MERC'S FIRST PUBLIC SECTOR LABOR LAW CONFERENCE

Friday, May 16, 1997

Eberhart Center of Grand Valley State College
Grand Rapids, Michigan

AUTHORITATIVE UPDATES

PRACTICAL WORKSHOPS

For registration material use the coupon page 12

Comments from the Chair cont'd

We will get back to you soon with the correct address for the web site.

The third matter concerns the timeliness of our ALJ decisions. As many of you will recall, over the last few years the judges have significantly reduced the time it takes them to write a decision. Normally the parties could expect to receive a decision within 6 months from the date the judge received the parties' briefs. Director Sperka informed the Commission at its last meeting, however, that the judges will now expect to render their decisions no later than 4 months from the date they receive briefs and that is the outside date. Most will be earlier than that. Needless to say, all of us on the Commission are very pleased and we know that you will be too.

The fourth matter concerns the Commission's fact finding and Act 312 panels. The Commission had the good fortune to meet with some arbitrators and fact finders a few weeks ago. We asked them to tell us how we could improve the panels and we received some very thoughtful responses.

I will report more to you on their suggestions after the Commission has had a chance to meet and review them in greater detail.

In closing I will mention that Director Sol Sperka and attorney Ron Helveston each came up with a suggestion a couple of years ago that is now seeing fruition. They wanted to have a seminar by Commission staff for representatives, officers, union and stewards, employer representatives, arbitrators and fact finders, and attorneys (yes, even attorneys) where all could come together for one day and talk about matters concerning MERC. The event will be covered in more detail by others in this newsletter so I won't get into the specifics. I just wanted to note that I think Sol's and Ron's idea is a good one and I hope to see you all there. ❑

Bureau Director's Column cont'd

The day will consist of workshops, panels and presentations. Although the agenda is not final as of this date, topics to be covered include how to conduct Act 312 arbitration, fact Finding, Unfair Labor Practice and Representation hearings, and in-depth reports on the latest MERC and Michigan Court Decisions. Specialty "forum" workshops are planned on labor law issues in public safety and public education.

This conference is designed for people who work in public sector labor law -- union officers, staffs, and union members; elected officials, administrators and staff of all size public employers. Of course, arbitrators, attorneys and even academics should find the program interesting. The workshops and discussions will be led by MERC staff, arbitrators and practitioners.

The program will have other benefits. This is an opportunity to meet and ask questions of Commission members, Bureau staff, arbitrators and advocates. This is also a chance to meet and learn from your peers, both those on your side of the table and the other side, in a "non-confrontational" forum.

We hope this conference will become a regular MERC/BER activity. To receive registration forms and the final program when they are printed, mail the coupon printed on page-------in this MERC MESSENGER.

On a different note, this fourth issue of the MERC MESSENGER completes one year of publication. We have included a brief survey to help us to make the MERC MESSENGER as useful as possible. Please fill out the survey form to let us know what you like in this publication and what we can add to enhance it. If you would rather, just call me at 313/256-3501.

Finally, I would like to introduce a new member of the BER staff, Denise Gall. She will be working with BER for the next two years in the Detroit office. She is a member of a group called The Governor's Management Interns. These are holders of graduate degrees, interested in public service, who want to learn the "nuts and bolts" of public administration by working in a state agency. Denise has a degree in Industrial Relations from Wayne State University, and will be assisting in many aspects of the Bureau's work. ❑

MERC Meeting Schedule 1996

- November 7, 10 a.m. - Lansing Office
- December 19, 10 a.m. - Detroit Office/BER Office Party

REPORTERS' COLUMN

Tips to Arbitrators for Making a Good Record

by Maria Greenough

As MERC court reporters, we have had the chance to watch most of MERC's fact finders and Act 312 arbitrators in action. I would like to take this opportunity to pass on some tips on conducting 312 or fact finding hearings I have gleaned from experienced arbitrators and from my perspective as a reporter. During an Act 312 arbitration hearing, a transcript is prepared by a MERC reporter for our Commission. Usually, this is the only indication that the Bureau/Commission have of what has transpired during the actual proceedings. Most of you already know how to create a clear, informative record, but here are some tips for newcomers to the process and reminders for all neutrals.

Witnesses and Controlling the Record

Although these hearings are not subject to the Michigan General Court Rules or rules on admitting evidence, it is important that an informative record be made and that the reporter be permitted to make a clear record. This includes:

- Individually swearing in witnesses,
- orderly questioning of witnesses,
- controlled colloquy among identified advocates and panel members.

"Round table," open discussions make a confusing record and often add nothing to the transcript except additional pages. These types of discussions should be held off the record. Your cooperation will mean fewer pages to search through with a more meaningful, informative record of the days' proceedings. Remember, everything spoken while on the record will appear in writing.

Exhibits

Exhibits should be numbered sequentially. You can avoid the duplication of numbers by marking just one set, and not having separate numbers for each party to the matter. The Reporter should mark and maintain a complete set of exhibits for the Arbitrator; you should prepare copies of each exhibit considered when furnishing copies to the parties involved. It's also important that the Arbitrator verbally rule on and admit or reject each exhibit so that the transcript clearly shows what is received and what has been rejected.

The transcript may be reviewed by the Bureau, or the Commission, or by other interested parties. It is required for appeal purposes, and kept on file for eight years . The effort you put into making the record is well worth it. The record will be preserved and used for reference for many years to come.

Let us know if we can assist in some way. We'll work with you on any suggestions you have to streamline the process of supplying transcripts in an efficient manner. ❑

INSIDE

This newsletter is a publication of the Michigan Employment Relations Commission/Bureau of Employment Relations Commission. Its contents are for informational purposes only; it is neither a formal journal of record nor legal authority.

CHANGES IN SELECTION PROCEDURE FOR FACT FINDERS AND GRIEVANCE ARBITRATORS

The Bureau of Employment Relations has implemented important changes in the method of selecting fact finders and grievance arbitrators. These changes were authorized by the Commission sometime ago, but required revisions in the mainframe computer programs used in the selection of all Commission neutral panels. The changes in effect (1) the size of panels and (2) the method by which the parties select from the panel.

Fact Finding:

The standard panel which parties to a fact finding will receive has been expanded from three to five names. The method of selection has also been changed to a "strike and rank" method. Parties may now strike any number of names up to four, and rank the remaining names. The computer will then compare the numerical rankings of these remaining names and identify for appointment the neutral with the lowest total score.

Grievance Arbitration:

There are several changes in our grievance arbitration process. The Commission has changed the standard size of panels going to the parties. The panel will now be nine instead of three names. Of course, if the parties' contract provides, the Bureau will furnish panels of three, five or seven names. Another important change is that parties now may reject the first panel. If either party rejects all names from the first panel, a second panel will be provided to both parties. If the second panel is rejected by either party, the Commission will make the appointment.

The method of selection for grievance arbitration has changed. The Bureau will now use a "strike and rank" system whereby any number of names can be stricken completely and the remaining names ranked numerically. Here again, the ranking of the remaining names by each party will be compared and the arbitrator with the lowest numerical score will be appointed.

Other aspects of the selection process remain unchanged. Parties may still object to any name if the arbitrator is described as an advocate on his/her biography, and a non-advocate name will be substituted. Parties may also stipulate to any name on the Commission's master list. Working through the mediator, parties may ask for expedited fact finding in cases where time is of the essence. In cases of unusual complexity, the parties may jointly request the Commission to appoint a "blue ribbon" panel. Under this process the Commission does not use the computer's random selection, but chooses a panel with special qualifications for the particular dispute.

Other refinements in our procedures and computer programs are underway, and as completed will be implemented. If you have any questions about the new procedures, please call Bureau Director Shlomo Sperka at 313/256-3501 or Mary Stiehl at 313/256-3502 regarding fact finding, and Nancy Pitt at 313/256-3545 regarding grievance arbitration. ❑

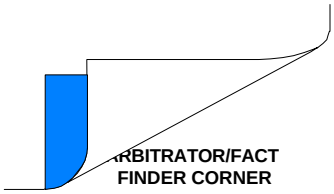
ARE YOU KEEPING MERC UPDATED?

by Mary Stiehl

The Michigan Employment Relations Commission meets monthly. At these public meetings the Commission reviews a written case status report on all pending Act 312 Arbitration cases and Fact Finding cases. The Commission determines which cases are progressing and which are lagging, based only on the information we have. The information presented to the Commission in these monthly reports depends, in large part, on **you** -- the assigned arbitrator or fact finder.

We gather information for the case status report from various sources, such as: copies of your correspondence, the court reporter's calendar, and information you may provide to us by phone or fax. When you set a pre-hearing or hearing date, set further mediation dates, and correspond with the court reporter or the parties to the case with a copy to MERC, we can track the progress of the case and keep the Commission updated. For every activity, case handling event, or whenever dates are set for hearings, briefs, executive sessions, etc., let us know. If you encounter an unusual delay, let us know. We want to keep your case record current and clear.

You may contact Mary Stiehl at the Detroit office (313) 256-3504, anytime to update MERC on the status of your current case assignment. ❑



SIGNIFICANT MERC AND COURT DECISIONS ISSUED IN THE THIRD QUARTER OF 1996

by Julia Stern

Significant Supreme Court and Court of Appeals Opinions Issued in the Third Quarter

Act 112 Amendments to PERA Held Constitutional

Michigan State AFL-CIO, et al v Employment Relations Commission

Michigan Education Association, et al v Governor of the State of Michigan and Employment Relations Commission

453 Mich 362 (1996)

In the above opinion, the Michigan Supreme Court affirmed the constitutionality of 1994 PA 112, amending PERA. The Court unanimously upheld all but one section of the statute.

The circuit court had upheld all but two provisions of Act 112. Section 10, which required a court to grant injunctive relief if it found that a strike or lockout had occurred, without consideration of the factors normally considered in granting equitable relief, it found to violate the separation of powers. The circuit court also struck down that portion of Section a(4) which imposed upon a bargaining representative an automatic fine of $5,000 per full or partial day its member or members were found to be engaged in a strike. The state did not appeal the circuit court's findings. The remainder of the statute was found to be constitutional by the Court of Appeals.

Section 17 of Act 112 prohibits a state or regional educational association from vetoing a collective bargaining agreement reached by a local unit. Three Supreme Court justices (Brickle, Riley and Weaver) found this section to be constitutional. They concluded that an association's right to compel conformity among its individual groups is not protected by the First Amendment. They also concluded that Section 17 does not prohibit educational associations from attempting to persuade their local units to act as a cohesive unit. Three justices (Mallett, Cavenaugh, and Boyle) found Section 17 to violate the First Amendment right to freedom of association. These justices concluded that Section 17 impermissibly interferes with the internal organization of the association and unconstitutionally prohibits a public school employee from joining an association whose internal organization is hierarchical in nature. The seventh justice, Levin, concluded that the constitutionality of Section 17 depends on how it is interpreted. He held that the final decision on its constitutionality cannot be made until the Court sees how the state chooses to enforce it. Because there was no majority to find Section 17 unconstitutional, the provision stands.

Highlights of the remainder of the opinion include rejection by the Court of the unions' argument that the amendments are unconstitutional because they contain conflicting definitions of an illegal strike. Subsection a of Act 112 sets out the procedure whereby public school employees may be fined for engaging in a strike. It states that a public school employer may file a notice alleging a strike by "1 or more public school employees." Subsection 6(1) contains the definition of the term "strike." Under this section, a strike requires concerted action. The Court reconciled these two sections by holding that the concerted action can be action other than abstaining from work, such as providing financial support. That is, one employee may be "on strike" if he or she alone abstains from work, as long as other employees have engaged in concerted action in support of the strike even though they themselves have not engaged in a work stoppage.

The Court agreed with the lower courts that Subsections 15(3) and (4), which appear to prohibit a public school employer from discussing certain subjects with the bargaining representative, in fact merely make these subjects illegal subjects of bargaining. Therefore, the employer is free to discuss these subjects with the union but cannot enter into a contract embodying an agreement on these issues.

The Court also rejected the unions' claim that Subsections 15(3) and (4) violate constitutional equal protection rights because they single out public school employees as a group separate from other public employees. The Court held that public school employees are not a protected class. The "strict scrutiny" test therefore does not apply and the statute only has to meet the "rational basis" test. The Court concluded that the restrictions on the subjects of bargaining contained in Act 112 were rationally related to the public purpose of reducing strikes by public employees.

The unions also challenged the amendments' prohibition on unfair labor practice strikes as an impermissible restriction on speech. Here the Court said that while picketing is an activity protected by the First Amendment, striking is not. In a footnote, the Court said that Act 112 did not affect the holding of Rockwell v Crestwood School District Board of Education, 393 Mich 616 (1975). This case held that MERC has the power to reinstate employees discharged for engaging in an unfair

labor practice strike as a remedy for the employer's unfair labor practices.

Duty to Bargain over Changes in Past Practices Conflicting with the Contract Language

Port Huron Education Association v Port Huron Area School District

Case No. C88 F-149, 1990 MERC Lab Op 903, 1995 MERC Lab Op 42 (on remand)

452 Mich 309 (1996), motion for rehearing denied ___ Mich ___ (September 16, 1996)

In this case and its companion, Detroit Police Assoc. v Detroit (see below), the Supreme Court attempted to resolve the longstanding issue of whether a past practice contrary to unambiguous contract language can become a term or condition of employment.

In Mid-Michigan Ed. Assoc. v St. Charles Community Schools, 150 Mich App 763 (1986), the employer had begun paying coordinated benefits to married employees with other health coverage, despite the fact that the parties' contract on its face clearly excluded this benefit. The impetus for the employer's action was an Attorney General's ruling that failing to pay this benefit violated the law. Despite the employer's action, the parties retained the same contract language. When the Attorney General's ruling was overturned, the employer unilaterally stopped paying. The Court of Appeals held that an employer was required to give the union an opportunity to bargain before eliminating the benefit. The Court said that despite the contract language the benefit had become a term and condition of employment.

In Port Huron, the parties had contract language which said that teachers hired after the beginning of the school year would be paid "prorated" health benefits. Despite this language, the employer continued for a number of years to pay full premiums for all teachers commencing with their date of hire. During the 1987-88 school year the employer hired an unusually large number of teachers after or near the end of the first semester. At this point the employer noticed the proration language in its contract and announced to the new teachers that they would be responsible for paying their own health premiums for the month of August following their hire. The union filed a grievance (which was dropped) and an unfair labor practice charge. In both it argued that "proration" meant that the employer's obligation to pay health premiums for teachers hired during the school year began on the teacher's date of hire. The union asserted that the provision was not intended to affect the employer's obligation to cover the teacher after he or she was hired. MERC found the proration language to be inherently ambiguous. It also held that the employer either knew or should have known that it was paying full premiums to all teachers, and that the parties had tacitly agreed to the additional benefit which had become a term and condition of employment. The Court of Appeals affirmed in an unpublished opinion. The Supreme Court, however, remanded to MERC for reconsideration of its finding that the contract language was ambiguous in light of a second contract clause which had not previously been brought to MERC"s attention. In its opinion on remand, MERC concluded that when both clauses were read together the contract was not ambiguous. It concluded that the contract clearly provided that teachers who worked less than half the 185 day school year were entitled to benefits for only half the summer.

The Supreme Court majority (Boyle, Brickley, Mallett, Riley and Weaver) affirmed MERC's conclusion on remand that the contract language was unambiguous. The Court then held as follows:

> **Where the contract is silent or ambiguous on a topic, a past practice constituting a term and condition of employment may be established merely by "tacit agreement" or inference from the circumstances. However, where unambiguous language in the agreement conflicts with the past practice, a higher standard of proof is required. The unambiguous language controls unless the past practice is so widely acknowledged and mutually accepted that it creates an amendment of the contract. The party seeking to supplant the contract language must prove that the parties had a meeting of the minds with respect to the new terms or conditions, intentionally choosing to reject the negotiated contract and knowingly acting in accordance with past practice.**

Mid-Michigan Ed. Assoc. v St. Charles P.S., supra, was explicitly overruled.

The Court concluded that the union in Port Huron had to prove the the employer had knowingly paid full insurance premiums regardless of hire date. Here, the employer claimed mistake and there was no direct evidence that the employer actually knew it had been providing an extra benefit. MERC's finding that the employer either knew or should have known that it was paying the benefit was insufficient to overcome the express language of the agreement. MERC's finding that the employer had violated its duty to bargain was reversed.

In dissent, Justices Cavanaugh and Levin disagreed with MERC's finding on remand that the contract's proration language was unambiguous and concluded that MERC should have found it to be so as a matter of law. The dissenters interpreted Mid-Michigan as standing for the proposition that contract language which is not ambiguous on its face may become so when examined in connection with a past practice contrary to the contract's apparent meaning. According to the dissenters, MERC should have concluded that the proration provision was ambiguous when considered in conjunction with the parties' past practice, even if it was not inherently ambiguous on its face.

Detroit Police Officers Association v Detroit
Case Nos. C90 L-229 & C90 L-301, 1993 MERC Lab Op 424 - 214 Mich App 393 (1995)
452 Mich 339 (1996)

In this case, a companion case to Port Huron, the Supreme Court applied the test set out above to a different set of facts and concluded that a past practice had become a term and condition of employment despite conflicting unambiguous contract language.

The Detroit Retirement System Board of Trustees (found to be an agent of the employer for purposes of this case) admittedly had a longstanding practice - dating perhaps to 1941 - of having the Board's medical director determine both the question of an officer's incapacity to work and the question of whether the injury was duty-related. Under the Board's practice, in disputed matters the decision of a medical board of review was binding on the Board with respect to both factors. In December, 1990 the Board of Trustees passed a resolution limiting the medical director's authority to questions of incapacity. The union filed a lawsuit and an unfair labor practice. The parties disagreed over whether the City Charter, which had been incorporated into the parties' collective bargaining agreement, required decisions on duty-relatedness to be made by the medical director and medical board of review.

MERC agreed with the union that under the charter the Board's responsibility to determine duty-relatedness was delegated to the medical director and the medical board of review. It found the employer guilty of an unlawful unilateral change in terms and conditions of employment. The Court of Appeals affirmed.

The Supreme Court majority (Cavanaugh, Boyle, Levin and Mallett), after citing a different portion of the Charter, stated the issue of the case as "whether the parties' past practice is so widely acknowledged and mutually accepted that it amends the contradictory and unambiguous contract language in the collective bargaining agreement." Applying the Port Huron test, the Supreme Court concluded that the record established not only that a past practice existed, but that the past practice was so prevalent and widely accepted that the parties had a meeting of the minds with respect to the new terms or conditions of employment. The parties' actions, therefore, constituted an agreement to modify the contract language. The Supreme Court affirmed the conclusion of the Court of Appeals and MERC that the employer had committed an unfair labor practice.

In dissent, Justices Riley, Weaver and Brickley concluded that the case should be remanded to MERC since it had not had the opportunity to apply the Port Huron test.

Increase in Benefits Made by MESSA is a Unilateral Change

St. Clair Intermediate School District v Intermediate Education Association, Michigan Education Association, and Michigan Education Special Services Association
Case No. CU90 H-33, 1993 MERC Lab Op 101 and 1994 MERC Lab Op 1167 (on remand)
___Mich App ___ (issued September 17, 1996)
COA 161643 & 161645

The Court of Appeals affirmed MERC's finding that the Michigan Education Special Services Association (MESSA) acted as an agent of the Michigan Education Association (MEA) when it increased the maximum lifetime benefit for a health plan covering the employer's employees. It also concluded that respondents violated their duty to bargain in good faith under PERA by neglecting to provide the employer with notice and an opportunity to bargain before making changes in the existing level of benefits. The Court concluded that the evidence did not support a finding that the employer had clearly, explicitly and unmistakably waived its right to bargain by its failure to object to prior changes, and that the employer had not explicitly agreed to be bound a document in which MESSA reserved the right to make unilateral changes. ❑

Significant MERC Opinions Issued in the Third Quarter

Voluntary Recognition of a Parent Bargaining Organization where its Affiliate is the Certified Bargaining Agent

Schoolcraft Community College -and- Michigan Education Association (MEA)
Case No. R95 K-172, 1996 MERC Lab Op ____ (issued September 10, 1996)

MERC held that the MEA had become the legal bargaining representative of a unit of full-time clerical employees where its affiliate, the Schoolcraft College Association of Office Personnel (SCAOP), was the certified bargaining agent. The employer had dealt with the MEA on all matters of collective bargaining and administration of the contract for over 20 years and had therefore voluntary recognized the MEA as the bargaining representative. MERC dismissed the MEA's petition for an election to accrete these employees to another unit.

In this case the MEA petitioned for an election to accrete both the SCAOP unit of full-time clericals and certain regular part-time clericals to the MEA's existing unit of other support staff employed by the College. The regular part-time clericals, who were unrepresented, worked between 16 and 26 hours per week. This group had previously rejected an attempt by SCAOP to accrete them to its unit. The employer argued that the petition was improper because it had already recognized the MEA as the bargaining agent of the full-time clericals. The employer testified that it had dealt with the same MEA Uniserv Director on the same basis for both the support staff unit and the full-time clerical unit since SCAOP had voted to affiliate with the MEA in 1976. The assigned Uniserv Director had acted as chief negotiator for all contracts for both units, signed these contracts, and handled the processing and arbitration of grievances for both units. According to the employer argued that the instant petition was an improper attempt to bring the excluded part-timers into the unit without giving them an opportunity to vote separately on whether they wished to be represented by the MEA. It asserted that two separate elections should be held: one election to permit the part-timers to vote on whether they wished to be accreted to the unit of full-time clericals, and a separate "unit merger" election in which the members of the support staff unit and the members of the clerical unit would vote on whether they wished to merge their units. See Lansing School District v MERC, 117 Mich App 486, (1982), aff'g 1981 MERC Lab Op 232 after remand.

The MEA asserted that its role vis-a-vis the clerical unit was "service provider," and that SCAOP remained the legal bargaining representative. MERC agreed with the employer. It stated:

> **Whatever significance the MEA wishes to attach to its alleged "service provider" status in the SCAOP unit, we find that under PERA the MEA is, and has been for many years, a bargaining representative for the unit along with its affiliate SCAOP, and it has been recognized as such by the Employer. The relationship and activity of the MEA in regard to both of its affiliates at the College, SCAOP and SCSPA (the support staff unit), as displayed to the public are indistinguishable. This Commission does not intend to look behind affiliations in representation matters to determine the nature and validity of the relationship between a local affiliate and its parent body.**

Application of Exclusionary Language to New Positions

Farmington Public Schools -and- Farmington Education Association (Decision and Order on Motion for Reconsideration)
Case No. UC94 K-59, 1996 MERC Lab Op ____ (issued September 10, 1996)

In a decision on a motion seeking reconsideration of MERC's previous finding (1996 MERC Lab Op 77) that teachers in an Alternative Academy program were excluded from the unit by contract language excluding "adult education teachers", MERC repudiated several earlier decisions dealing with the application of exclusionary language to newly created positions.

The employer and the petitioner had language in their recognition clause excluding "adult education teachers." During the term of the contract the employer took over a number of programs previously run by an adult education consortium. Among these was the Alternative Academy, a program for students aged 16 through 19 who had either dropped out or were considered at risk of dropping out. Petitioner sought to accrete the Academy teachers to its K-12 unit on the
grounds that they were not, in fact, adult education teachers. Petitioner also argued that under Farmington Public Schools, 1982 MERC Lab Op 1519, C.S. Mott

Community College, 1984 MERC Lab Op 928 and related decisions, the exclusionary language should not be read to include Academy teachers because they were not employees of the employer at the time this language was incorporated into the contract.

MERC reaffirmed its original finding that the Academy teachers were adult education teachers. MERC then reviewed its precedent on the application of exclusionary language to new positions. MERC noted that it had held that it would not read exclusionary language as necessarily expressing an agreement to exclude new positions created during the term of the contract. MERC concluded:

> **It is evident to us on reconsideration of this issue that both Farmington and Mott failed to give adequate weight to exclusionary language. We do not clarify a unit during the term of a contract where this would disturb an established agreement between the parties concerning unit placement; unit clarification is only appropriate to resolve ambiguities. Genesee County, 1978 MERC Lab Op 552. A collective bargaining agreement is the expression of the agreement of the parties. When the parties enter into a contract which contains a recognition clause with exclusionary language, they should be presumed to have agreed to exclude all positions covered by that language, whether or not these positions exist at the time the contract is signed. In the case of ambiguous exclusionary language, the burden should be on the party seeking to limit the exclusion to prove that the parties did not intend the language to cover the newly-created position. This presumption, of course, applies only to exclusions actually incorporated into the contract. There is no reason to presume that because the union has never sought to represent, for example, any of the employer's community education employees, it has agreed to exclude any and all new positions created as part of the employer's community education program. Nor is there a reason to presume that because parties have agreed to a particular unit description, they have agreed to exclude all new positions which, although not explicitly excluded, do not fit within the unit description as written. To the extent that the language or holdings of our previous cases are inconsistent with the principles set out in this decision, they are overruled.**

MERC concluded that in the instant case there was no evidence that the parties did not intend the language excluding "adult education teachers" from their unit to exclude new adult education positions. It reaffirmed its conclusion that the position of Alternative Academy teacher was excluded from the bargaining unit of teachers represented by petitioner by the language in the parties' recognition clause expressly excluding adult education teachers.

This decision is pending on appeal before the Court of Appeals

Duty to Provide Information About a Nonbargainable Decision to Subcontract

Pinckney Community Schools -and- Washtenaw-Livingston Education Association/Pinckney Education Association

Case No. C94 F-136, 1996 MERC Lab Op ____ (issued July 16, 1996)

MERC affirmed the conclusion of its administrative law judge that the employer had no duty to provide the union representing its teachers with information about a proposed subcontracting of management services because the employer only engaged in "exploratory discussions" and ultimately dropped the matter. The administrative law judge found that the decision to subcontract management services was not a mandatory subject of bargaining. However, the administrative law judge also found that had the employer actually "taken steps to engage the services" of the contractor, the union would have had the right to all relevant information in order to bargain the impact of the decision. MERC noted that it did not read the administrative law judge as holding that an employer's duty to provide the union with information relevant to the impact of a nonbargainable subcontracting decision does not arise until the subcontract has been finalized and approved by both parties, and it stated that it did not reach the issue of when such duty might attach.

Objections to Elections - Union Promise of Benefits

Saginaw County Mental Health -and- SEIU Local 582 -and- Saginaw County Mental Health Employees Union Case No. R96 E-77, 1996 MERC Lab Op ____ (issued September 10, 1996)

MERC concluded that a union did not interfere with the conduct of an election when it promised voters that if it won the election all the monies in the treasury of the incumbent union would be distributed among the members of the bargaining unit. MERC distinguished cases such as Alyeska Pipeline Service Co., 261 NLRB 125 (1982) and Crestwood Manor, 234 NLRB 160 (1978) holding that unions had interfered with elections by promising to give voters unlawful hiring hall preferences or financial benefits contingent on the unions' success. In this case the petitioning union had no control over the treasury of the incumbent and no power to carry out the alleged promise. The union's statement should therefore be considered a prediction rather than a promise and as such within the range of acceptable campaign propaganda which voters are capable of evaluating.

C O U P O N

MERC LABOR LAW CONFERENCE 1997

Please send conference notice and registration form to:

NAME: _____

ADDRESS: _____

CITY:_____ **STATE:** _____ **MI** _____

ACT 312 DECISIONS

July 1, 1996 - September 30, 1996

RECEIPT DATE	EMPLOYER	UNION	ARBITRATOR
07/09/96	Bloomfield Township	Bloomfield Township Association of Professional Fire Fighters	Mario Chiesa
07/23/96	Mason County	Police Officers Labor Council	Donald F. Sugarman
07/25/96	City of Holland	Holland Fire Fighters No. 759	Stanley T. Dobry
08/16/96	Berrien County	Police Officers Labor Council	George J. Brannick
09/12/96	City of Greenville	Police Officers Association of MI	Thomas J. Barnes
09/23/96	City of Traverse City	Teamster Local 214	Dr. Richard N. Block
09/25/96	City of Pontiac	Command Officers Association of MI	Daniel H. Kruger

Total Awards/Reports Received: 7

FACT FINDING REPORTS

July 1, 1996 - September 30, 1996

RECEIPT DATE	EMPLOYER	UNION	FACT FINDER
07/01/96	Village of Dundee	Operating Engineers Local #547	Robert F. Browning
07/01/96	Village of Dundee (Foreman)	Operating Engineers Local #547	Robert F. Browning
07/25/96	Fruitport Community Schools	MEA - Instructional Assistants	Mark Scarr
08/01/96	City of Traverse City	UWAU, Local #295	Martin L. Kotch
08/12/96	Pinckney Community Schools	Washtenaw Livingston Ed. Assoc.	Mark J. Glazer
08/12/96	Ferris State University	Ferris Hall Directors Assoc.	Kenneth M. Gonko
09/03/96	Ferris State University	Police Officers Labor Council	S. Olof Karlstrom
09/03/96	Ferris State University	Police Officers Labor Council	S. Olof Karlstrom

Total Awards/Reports Received: 8